REME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUN 8 1970
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

NO. [redacted] 234

WILLIAM E. GOETZ, ET AL

VS

STATE OF TEXAS

On Appeal From The Judgment Of The
Texas Supreme Court

JURISDICTIONAL STATEMENT

EARLE COBB, JR.
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ATTORNEYS FOR
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JURISDICTIONAL STATEMENT

Pursuant to Supreme Court Rules 13 (3) and 15, WILLIAM E. GOETZ, HOWARD C. GOETZ and WALTER E. GOETZ, the above Appellants, file this their statement of the basis on which Appellants contend that the Supreme Court of the United States has appellate jurisdiction over the judgment appealed from herein.

(a) OPINION BELOW

The opinion delivered in the Texas Supreme Court is reported in Volume 13, Number 19, Page 191, of the Texas Supreme Court Journal and in ___ SW 2nd ___. A copy of the majority opinion is attached. Also attached is a copy of the opinion of the Court of Civil Appeals for the Third Judicial District which opinion is reported in 440 SW 2nd 892.

(b) GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

(i) The appeal herein is from a judgment of the Texas Supreme Court following an application for Writ of Error from the Judgment of the Court of Civil Appeals. The Texas Supreme Court judgment violates provisions of the U.S. Constitution, to-wit: Article 1. Section 10, Amendment XIV, and Amendment V. This appeal is brought pursuant to the provisions of 28 U.S. 1257 Section (2) and should alternatively be considered as Writ of Certiorari pursuant to 28 U.S. C. 1257, Section (3) and 38 U.S. C. 2103.

(i i) The judgment sought to be reviewed was made and entered February 11, and Appellant's Motion for rehearing was overruled March 18, 1970, when said Judgment became final. The Notice of Appeal was filed in the Texas Supreme Court on the 23rd day of March, 1970, and Amended on March 25, 1970.

(iii) The Statutory provisions believed to confer on the Supreme Court of the United States jurisdiction of the appeal are Sections (2) and (3) of 28 U.S.C. 1257. (Also Article III Section 2 of the U. S. Constitution and Article VI).

(iv) Cases believed to sustain the jurisdiction are:

(a) Legislation - Administrative Order of State Agency

Lake Erie Ry vs State Utilities Comm. 39 S. Ct. 345, 249 U.S. 422, 63 L. Ed. 684.
Hamilton vs Regents of State University of Cal. 55 S. Ct. 197, 293 U.S. 245, 79 L. Ed. 344

(b) Contract Impaired

Irving Trust Co. vs Day, 62 S. Ct. 398. 314 U.S. 556, 86 L. Ed. 452, 137 ALR 1093.
Appleby vs City of N.Y. 46 S. Ct. 569. 271 U.S. 364, 379, 70 L. Ed. 992.
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Trustee of Dartmonth College vs Woodward 4 Wheat 518, 4 L. Ed. 629.
Piqua Branch of State Bank of Ohio vs Knoop 16 How 369, 14 L. Ed. 977.
Stone vs Mississippi 101 U. S. 814, 25 L. Ed. 1097
Von Hoffman vs Quincy 4 Wall. 535, 18, L. Ed. 403.
Atlantic Coast Line Ry vs Phillips 67 S. Ct. 1584 322, U. S. 168, 91 L. Ed. 1977, 173 ALR 1.
International Steel and Iron Co. vs National Surety Co. 56 S. Ct. 619, 297 U. S. 657, 80 L. Ed. 961.
Houston Ry vs Texas S. Ct. 545, 177 U. S. 673
La Reta Co. vs New Orleans 35 S. Ct. 62, 235 U. S. 164, 59 L. Ed. 175.
Doty vs Love 555 S. Ct. 558, 295 U. S. 64, 79 L. Ed. 1303.
Morehead vs N. Y. exrel Tipaldo 56 S. Ct. 918 298 U. S. 587, 80 L. Ed. 1347, 103 ALR 1455
La. Ry. etc. vs New Orleans 35 S. Ct. 62, 235 U. S. 164, 59 L. Ed. 175.

(v) The Statute of Texas, the validity of which is involved, is the administrative order of the State Attorney General which ruled that the parties must follow bidding procedures and that the contract entered into between the Board of Regents and Goetz was void since it varied from "standard" bidding procedure. The Attorney General's ruling was legislative in character. The facts will show that the validity of this order was the only disputed issue involved in this case, and that the effect of judgment of the Texas Supreme Court was to uphold this administrative order of the Attorney General and

retrospectively impair the contract. The contract had been properly consummated pursuant to Article 2647 Subdivision 7 of the Texas Revised Civil Statutes. Article 2647 Section 7 set out verbatim is as follows:

> "All appropriations made by legislature for the support and maintenance of State Teacher's Colleges, for the purchase of land or buildings, for the purchase of apparatus, libraries, or equipment of any kind, or for any other improvement of any kind shall be disbursed under the direction and authority of the Board of Regents: and said Board shall have power to formulate and establish such rules for the general control and management of the State Normal Schools for White Teachers, for the auditing and approving of accounts, and for the issuance of vouchers and warrants as in their opinion may be necessary for the efficient administration of such schools." Article 2647; Sub. 7.

The administrative order of the Attorney General is evidenced in the Board of Regent's Application for Writ of Error, Page 7, as follows:

> "The Board could not make an award in excess of the written bid submitted by Respondents."

And in the Transcript, Page 65, the Attorney General says:

"The Board of Regents, in my opinion, could not allow William E. Goetz & Sons to change the bid."

And on Page 10 of the Application for Writ of Error:

"..... The long standing policy of the Board of letting construction contracts on a competitive bid basis is valid and in accord with the general policy of the State, that contracts of the State should be made by the lowest responsible bidder."

It becomes obvious that the Statute in effect when the contract was made does not require bidding but the subsequent order of the Attorney General does and therefore constitutes administrative legislation, which applied retrospectively is unconstitutional.

(c) QUESTIONS PRESENTED BY THE APPEAL

The questions presented by the appeal are:

1. Was there a contract?[1]

1. The contract was really undisputed. The Trial Court found "The agreement was finally reached between Plaintiff and these representatives that an additional $17,000.00 - would be paid subject only to the condition that the Defendant had authority to make such payment." (R#19, P. 81).

2. Did the administrative order of the Attorney General impair the obligation of the Contract?

3. Did the judgment of the Texas Supreme Court uphold the validity of the administrative order?

4. Has Appellants' property been taken for public use without due process of law?

5. Does the application of the "Parol Evidence Rule" by the Texas Supreme Court to void a stipulated contract, constitute an adequate nonfederal basis for judgment, or is it a mere subterfuge?

(d) STATEMENT OF THE CASE

Appellant, Goetz, is a contractor, Appellee, Board of Regents, compose a State Agency created and authorized to contract by Article 2647, Revised Texas Statutes. Section 7 of Article 2647, which is quoted verbatim above gives the Board of Regents the power to contract "as in their opinion may be necessary for the efficient administration of such schools." At the time the contract in question was executed there was no requirement that the Board of Regents contract by bidding procedures, although most other State Agencies were required by statute to bid their contracts. Although the Board of Regents was not required to contract by bidding, they began to do so on the job involved. Goetz submitted a bid which he

discovered to be erroneous by the sum of approximately $26,000.00. Immediately upon discovering the error and before the bid was opened or accepted, Goetz made known this error to the Board of Regents and asked to withdraw his bid. The Attorney General refused to allow him to withdraw his bid, however, the Board of Regents commendably did negotiate with Goetz and passed a written resolution to the effect that they would pay the sum of $17,000.00 in addition to the amount bid in order to remedy the mistake. The figure of $17,000.00 was arrived at by compromise between the parties. Goetz relied on this agreement and did the job. There has never been suggested any unfairness of this agreement, nor has there been the slightest allegation that the contractor, Goetz, was in any way dealing sharply. As far as the record reflects or is known to the undersigned, the Board of Regents desired to abide by this contract, but could not do so solely because of the administrative order of the Attorney General.

The Attorney General refused to allow the Board of Regents to honor the contract because the Board of Regents did not follow "standard" bidding procedures. It is this administrative order of the Attorney General which the Texas Supreme Court upheld. The Texas Supreme Court has attempted to set up the parol evidence rule as an adequate non-federal basis for this judgment, however, an examination of the findings of fact of the trial court and the court of civil appeals together with the stipulations and admissions will show that the parol evidence

argument is a subterfuge and is no adequate non-federal basis for this judgment. There has never been any dispute as to the factual terms of the contract. The only dispute was a question of law as to whether or not the Board of Regents had authority under Article 2647, Section 7 to enter into the contract as done, or whether they must bid as the Attorney General ordered. The Court of Civil Appeals and the dissenting opinion of the Texas Supreme Court properly hold that the Board had the authority to enter into the contract and did in fact enter into the contract. The Texas Supreme Court had no right or jurisdiction to decide facts contrary to the stipulations of the parties, the findings of the trial court, and the findings of the Court of Civil Appeals. Their doing so under the circumstances of this case violates Section 10 of Article I of the Federal Constitution and is also a denial of due process under the XIV Amendment and the V Amendment. The Texas Supreme Court granted the Writ of Error and reversed the Court of Civil Appeals by a divided opinion. The majority in searching for a basis upon which to uphold the unconstitutional ruling of the Attorney General held the contract was void because it was proven by "extrinsic" evidence. They so held even though the agreement was undisputed and was evidenced in writing by resolution of the Board of Regents. Thus, the Texas Supreme Court without jurisdiction reversed a fact found by the Trial Court, a fact found by the Court of Civil Appeals, a fact undisputed by the parties, and having so done; refused to remand the case for a fair hearing, to determine the disputed facts, if

any. The dissenting opinion of the Texas Supreme Court correctly sets out the facts.

(1) Although the constitutional issues of legislative impairement of contract and due process of law were involved in the questions of fact and law originally presented by the pleadings, the federal questions were not raised as such until the motion for rehearing in the Texas Supreme Court. Since the contract had been stipulated by both parties, and because the contract was not, as to it's terms, in any way disputed, there was really no issue of impairement of the contract until the Texas Supreme Court ruled that the contract was not in existance.

(2) In "Respondents' Motion for Rehearing" (R No. 8) Petitioners made the following assignments of error:

> "1. The Court has erred in voiding an undisputed and stiuplated contract by applying the 'parol evidence rule' and has thereby deprived Petitioner of due process of law contrary to the Four - teenth Amendment of the Constitution of the United States."
>
> "2. The Court has erred in depriving Respondents of an undisputed stipulated contract, which constituted the taking of private property for public use without just compensation, contrary to Amendment V of the Constitution of the United States."
>
> "3. The Court has erred in upholding

the action of the Attorney General in refusing to allow the Board of Regents to pay this admitted and undisputed contract, which action upholds an unlawful and unconstitutional order of a State Legislative Agency impairing the obligation of the contract contrary to Section X of the Constitution of the United States of America and Amendments X and XIV of the Constitution of the United States of America."

"4. The Court erred in failing to decide the one and only disputed issue involved in this case which is whether or not the Board of Regents was prohibited by the Constitution of the State of Texas from paying the $17,000.00 as agreed, and the failure to decide this issue constitutes a violation of Section X and Amendments V and XIV of the Constitution of the United States of America."

"5. It is undisputed and stipulated that the Petitioners, Board of Regents, will pay and desire to pay this debt provided they have the authority to do so, however, in the event this is not the case or the Court has found to the contrary, and strictly in the alternative, Respondents allege that such action of the Board of Regents is an order of a State Administrative Agency contrary to and in violation of Section X and Amendments V and XIV of the Constitution of the United States of America, and constitutes the taking of private property for public

use without just compensation, the taking of property without due process of law, and the impairment of the obligation of contract."

(3) The Texas Supreme Court refused to hear any additional oral argument although the voiding of the contract raised entirely new issues, and on March 18, 1970, the Texas Supreme Court summarily overruled the Motion for Rehearing thereby upholding the Order of the Attorney General (R No. 4).

(e) REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

The reasons why the questions presented by the appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution are:

1. The State has deprived Goetz of $17,000.00 of his rightful property which has been taken for public use without just compensation.

2. The Attorney General of the State of Texas has arbitrarily, capriciously and retroactively rewritten the law of the State for the benefit of the State, contrary to the Constitutional provisions both of the State of Texas and of the United States.

3. Appellant has been denied due process of law in that the Texas Supreme Court has

stricken a contract without opportunity for hearing by remand or agrument of that issue contrary to the U. S. Constitution, contrary to the Court's own statutory jurisdiction, and contrary to all concepts of due process.

4. This case sets up a procedure which if allowed will permit the State and Attorney General to ignore the Federal limitations on its power and to prevent citizens from enforcing contracts with the State.

CONCLUSION

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal.

DATED this 20 day of May, 1970.

EARLE COBB, JR.
JAMES K. GARDNER

By James K. Gardner
James K. Gardner

WE, Earle Cobb, Jr., and James K. Gardner Counsel of record for Appellants in the above entitled cause, hereby state that all parties required to be served with the foregoing Jurisdictional Statement have been served.

ATTORNEYS FOR APPELLANTS

By James K. Gardner
James K. Gardner

IN THE SUPREME COURT OF TEXAS

NO. B-1599

BOARD OF REGENTS OF THE STATE TEACHERS COLLEGES OF TEXAS; NOW BOARD OF REGENTS, STATE SENIOR COLLEGES, ET AL,	)	
Petitioners,	)	
VS	)	From Travis County Third District
WILLIAM E. GOETZ, ET AL	)	
Respondents	)	

This declaratory judgment suit was filed by Wm. E. Goetz, Howard C. Goetz and Walter E. Goetz, building contractors, as plaintiffs, against the Board of Regents of the State Teachers Colleges of Texas, as defendant, seeking to have declared and adjudged their right to recover the sum of $17,000.00 in addition to the sum stated in a contract entered into on August 14, 1958, wherein they agreed to construct additions to the library and Science Buildings at Southwest Teachers College in San Marcos, Texas.

The following alleged facts are disputed: The plaintiffs alleged that pursuant to the defendant's request for bids for the construction and

improvements on the Science and Library Building at the Southwest Texas Teachers College in San Marcos, they submitted a bid in the sum of $864,888.00 ; immediately after the bids were opened on the morning of August 12, 1958, and before any bids had been accepted, plaintiffs notified the defendant that, because of an error, their bid was $26,153.65 too low; after negotiations between the parties, the plaintiffs and subcontractors agreed to absorb enough of this sum to reduce the alleged loss to $17,000.00, and after the defendant adopted a resolution to pay the sum of $17,000.00 in excess of the amount of plaintiffs' bid, provided such sum could legally be paid, the plaintiffs and defendant signed a written contract which provided for the payment of $858,888.00, rather than the intended bid of $885,041.65. Thereafter, the construction work was completed and all sums of money have been paid, except the sum of $17,000.00. Plaintiffs in their prayer for relief asked "that on final hearing of this cause that the Court declare and adjudge the plaintiffs made a reasonable mistake in their original submission of their bid for which they were entitled to be relieved and concerning which plaintiffs were not obligated to perform such work for the amount of their bid of $858,888.00, as submitted, and bear the loss of its mistake, to-wit, $26,153.65, and that the defendants can lawfully pay to the plaintiffs said sum of $17,000.00, etc. "The suit was defended on the ground that the relief sought was prohibited by the provisions of Section 44 and 51 of Article III of the Constitution of Texas ; and that the conditional resolution to pay an additional

sum of $17,000.00 formed no part of the contractual obligation created under the August 14, 1958 agreement. A non-jury trial resulted in a judgment that plaintiffs take nothing. The Court of Civil Appeals reversed the trial court's judgment and rendered judgment for the plaintiffs. 440 S. W. 2nd 892 . We reversed the judgment of the Court of Civil Appeals and affirm that of the trial court.

The record reflects that the bid submitted was erroneous in the sum of $26,153.65, as alleged by plaintiff, because the cost of certain masonry work was mistakenly omitted. The trial court made findings of fact and conclusions of law. The Court found as a fact that in reliance upon the resolution to pay the $17,000.00 plaintiffs and defendant executed the written contract in the amount of the erroneous bid, and thereafter, completed the work specified in the written agreement to the satisfaction of the defendant. The trial court concluded, as a matter of law, that the defendant could not legally pay the $17,000.00 in addition to the contract price of $864,888.00. The correctness of this holding is the sole question before this Court.

The Court of Civil Appeals has held that the resolution in regard to the additional payment of $17,000.00 became a part of the formal contract, just as though incorporated therein, upon the theory that contemporaneous written agreements relating to the same subject are to be construed "so as to give effect to all."

We cannot agree. The subject matter of the negotiations leading to the adoption of the resolution by the Board of Regents was specifically dealt with in the bid as well as in the contract which was signed by the parties. The bid and the final written contract to construct and improve the Science Building and Library Building at a cost of $864,888.00 included the masonry work. The conditional agreement to pay the sum of $17,000.00 in addition to that agreed upon as reflected in the contract was for the same masonry work. Such agreement is inconsistent with the final agreement entered into between the parties. These extrinsic negotiations are ineffective under the parol evidence rule which precludes the giving of legal effect to extrinsic negotiations which have been specifically dealt with in the final writing. IX Wigmore on Evidence, 3rd. ed. 1940, §§ 2430, 2443 and 2444. See Messer v. Johnson, (Tex. Sup. 1968), 422 S. W. 2nd 908; Jackson v. Hernandez, 155 Tex. 249, 285 S. W. 2nd 184(1955); Bradshaw v. McDonald, 147 Tex. 455, 216 S. W. 2nd 972(1949); Vansickle v. Watson, 103 Tex. 37, 123 S. W. 112(1909); 2 McCormick & Ray, Texas Law of Evidence, §§ 1602, 1634.

The judgment of the Court of Civil Appeals is reversed and that of the trial court is affirmed.

Clyde E. Smith
Associate Justice

Chief Justice Calvert concurs in the result.
Dissenting opinion by Associate Justice McGee in which Associate Justice Hamilton joins.
Associate Justice Reavley not sitting.

NO. B-1599

IN THE SUPREME COURT OF TEXAS.

BOARD OF REGENTS OF THE STATE TEACHERS COLLEGES OF TEXAS, NOW BOARD OF REGENTS, STATE SENIOR COLLEGES, ET AL	)	
Petitioners,	)	
VS	)	From Travis County Third District
WILLIAM E. GOETZ, ET AL	)	
Respondents	)	

DISSENTING OPINION

I respectfully dissent.

A more complete statement of facts is found in the opinion of the Court of Civil Appeals, 440 S. W. 2nd 892. It is important to note that unlike most cases involving the parol evidence rule, the facts of this case are undisputed. The intention of the parties is evidenced by the motion of the Board and the plaintiff's action in reliance upon it.

On August 14, 1958, at the official meeting of the defendant Board, the following motion was

entered in its minutes:

"Upon Motion of Regents Barnes, seconded by Regent Brown, it was ordered that:

The Board cooperate and work with the Attorney General's Department and see if there is a legal way to pay an additional $17,000.00 on the contract with Wm. E. Goetz & Sons. It is the concensus of this Board that the Board will make such payment if and when it is found it can legally pay the additional $17,000.00.

(Regent Barnes stated the motion just made accepting the low bid of Wm. E. Goetz & Sons, was made because of an honest mistake that was made by Wm. E. Goetz and Sons wherein the masonry work on the Science Building was not included and about which they knew nothing of when they submitted the bid. The cost of the masonry work would be approximately $26,000.00. The sub-contractors have advised that they will absorb enough to bring the amount down to $17,000.00. I made the motion on the theory that they were morally entitled to reimbursement for that amount, in the event it can be done legally.)"

Thereafter, in reliance upon said motion the plaintiff executed the construction contract in the amount of the original bid.

The trial court made certain findings of

fact that: (1) but for the additional agreement evidenced by this (above quoted) motion, the plaintiff would not have executed the contract; and (2) the "compensation" was granted or promised, prior to the time that the plaintiff entered into the contract.

The plaintiff has fully performed the written contract. The Board claims that it has made payments in accordance with the written contract price and cannot pay more. The Board refuses to pay the additional $17,000.00 claimed by the Plaintiff.

As I see it, there is only one question before the Court. Can the Board legally pay its $17,000.00 obligation as identified by the motion of August 14, 1958? I would hold that such payment is legal and due. This was first determined by the Court of Civil Appeals on April 23, 1969.

It is petitioner Board's contention that it made an award to respondents in the amount of the written bid and executed a contract in the amount of said bid, and that the Board could not create a binding legal contract on behalf of the State to pay an amount above the price stated in the written contract. Petitioners point out that the parties did not sign any contract for the additional $17,000.00. Petitioners argue that since respondents did not withdraw the bid, but instead signed and performed the written contract drawn in accordance with their written bid, its legal obligation is limited to the written contract price only.

Petitioners cite subdivision 77 of Article 2647 Tex. Rev. Civ. Stat. Ann. (1952). This article provides, in part:

> "All appropriations made by the Legislature for the support and maintenance of State Teachers Colleges, for the purchase of land or buildings for the use of such schools, for the erection or repair of buildings, for the purchase of apparatus, libraries or equipment of any kind or for any other improvement of any kind, shall be disbursed under the direction and authority of the board of regents;..." (Emphasis Petitioners').

Petitioner Board concedes that such statute does not require the Board to let contracts on a competitive bid basis. Petitioner refers to various statutes requiring certain state agencies to require competitive bidding. Article 2647, relied upon by petitioners, does not require the Board of Regents to let construction contracts on a competitive basis, nor does it require contracts to be signed or written.

The purpose of competitive bidding is to obtain the lowest price for the construction of public buildings. It should be noted in this case that the contractor's amended bid, including the $17,000.00 correction, was $15,445.00 lower that the next lowest bid and $54,112.00 lower than the second lowest bid. There is no claim of fraud or that such additional sum has not been earned.

Although the job was advertised for bids, Paragraph 19 of instructions to bidders provides: "The owner does not obligate himself to accept the lowest, or any other bid." Other bidders would have no basis for objection and have made none. There was no obligation to accept the original bid. Having made a bona fide mistake in the sum of $26,153.65, the contractor could have withdrawn his bid or rescinded the contract. Taylor & Son, Inc. v. Arlington Independent School District, 160 Tex. 617, 335 S.W. 2nd 371 (1960); 2nd 439 (Tex. Civ. App. - Austin 1952, writ ref'd n.r.e.); Jordan v. City of Beaumont, 337 S.W. 2nd 115 (Tex. Civ. App. - Beaumont 1960, writ ref'd n.r.e.). To induce him to undertake the work outlined in the construction contract, the contractor and the Board agreed upon a compromise figure of $17,000.00, payment of which was to be made when the Board found "it can legally pay the additional $17,000.00" The Board's action resulted in a lower bid than the correct bid, not a higher one; the net saving being the difference between $26,000.00 and $17,000.00.

Where competitive bids are required by statute or ordinance, bids containing bona fide mistakes may be withdrawn, or in certain instances contracts let thereon may be rescinded, but such bids or contracts cannot thereafter be changed in substance under normal circumstances. McQuillan, Municipal Corporations, Section 29.68 (Rev. ed. 1966).

However, the latter authority cites Demos Bros. General Contractors v. Mayor of City of

Springfield, 332 Mass. 171, 76 N. E. 2nd 166 (1947), which is more representative of the facts before us. In that case there was no statute requiring the Water Board to seek competitive bids, but it did do so. Thereafter, the Board allowed the successful bidder to strike out an escalator clause and to correct obvious mathematical errors before awarding the contract to the same bidder. The court said, page 168: "The short answer to these objections is .... there was no statutory limitation on the method of awarding such a contract by the water board .... It was not even obligated to ask for competitive bids, although it did so in this instance." In the companion case, on page 169, it was held that the petition for mandamus to require the mayor to sign the contract was correctly dismissed. As the contract is valid without the mayor's signature, there is no occasion for the writ to issue.

The majority opinion neglects to pass on the only question in the case. I am of the opinion that the Board had authority to negotiate in any manner that it was fit to obtain the lowest cost for the construction of the project by a reliable contractor.

As shown above, there is no statutory requirement that the Board of Regents obtain competitive bids or follow the normal procedures as would be required had the State Highway Commission been involved.

After the error in the bid was discovered, Goetz indicated that he would like to withdraw his

bid. He and the Assistant Attorney General, Mr. John Reeves, who was advising the Board of Regents, subsequently had several conferences. However, whether or not Goetz would have to forfeit the bond or deposit was not answered to the satisfaction of the parties. There never was a meeting of the minds on this question.

The Board wanted Goetz to do the work. A compromise was worked out whereby Goetz's bid was reduced from $26,000.00 on these items to $17,000.00. The motion on August 14 was passed pursuant to this agreement, and the same day the contract was executed by Goetz in reliance upon the compromise agreement.

The Board prepared the contract and it was approved by the Attorney General, with the understanding, evidenced by its weitten recorded motion, that the sum of $17,000.00 over and above the amount in the written contract would be paid, if legally possible.

All during these negotiations, the Attorney General apparently was relying on the Canion case (involving the State Highway Commission), which he interpreted as holding that once the specifications are submitted for bids as required by State law (actions of the State Highway Commission are controlled by an entirely different statute which required competitive bids) , and the bids are opened, the bid cannot be reformed. In State Highway Commission v. Canion, 250 S. W. 2nd 439, the court granted the contractor's plea to rescind the contract and recover his guaranty

deposit on the basis of an honest mistake. The case was not one involving reformation. In that case the contractor could not seek reformation because the Standard Specifications for bidding provided in effect that a request to change the unit prices must be in writing and in the hands of the State Highway Engineer prior to the time set for opening of proposals."

It is now conceded by the Attorney General that the statute governing the actions of the Board of regents does not require the seeking of competitive bids. This was the only possible impediment to the legality of the compromise agreement evidenced by the virtually contemporaneous agreement to pay $17,000.00, if legal, and the execution of the contract. The bid was reformed and agreed to, almost simultaneously with the execution of the contract, and together, they constituted one contract between the parties. Otherwise, there was no meeting of the minds, and plaintiff should be entitled to recover on the theory of unjust enrichment. The Board has commended the quality of the work and agreed that the true value of the work is the total of the contract price plus $17,000.00.

Plaintiff offered in evidence the affidavit of Board member, Mr. Brown (full text of which is annexed to this opinion). Mr. Reeves stipulated that the affidavit was attached to one of his motions on file in this cause. The trial court sustained Reeves' objection to the last clause only. It stated in part: "By agreement of the parties, it was decided that the Board of Regents would

pay an additional $17,000.00 (which figure was arrived at by compromise and settlement) if the Board of Regents had the legal authority to do so ..... It was the consenious (sic) of the Board of Regents that the Board would do so if advised by the Attorney General or other authority that it would be legal to do so. If the Attorney General or other authority ruled that it could be done, I considered it a part of the contract ..... The agreement to pay the additional $17,000.00 was not a gift or a grant to Walter Goetz, but was a promise given as consideration for the execution of the contract dated August 14, 1958, but was just compensation due Mr. Goetz by reason of the error .... "

The courts are the other authority to pass on the legality of the compromise agreement. We should not duck the only question (legality of the compromise agreement) existing in the minds of the contracting parties by resort to rules of evidence in order to reach an unjust and contrary result.

Mr. Reeves testified : "The question, so far as I can see, with regard to this motion that the Board filed, was that they did want Goetz and Sons to have the contract, and if he was willing to accept the award, they were willing to, as stated in the resolution, they were willing to pay him an additional sum over the award. "

Despite plaintiff's pleadings and evidence that there was but one contract which was in the amount of the bid plus $17,000.00 the Board

offered no rebuttal testimony as to the intention of the contracting parties. The affidavit of Board member Wm. V. Brown clearly reflects that he considered the motion to be a part of the contract.

Despite the testimony of Reeves, quoted above, he then testified that had the contract or award, as he calls it, been in amount which included the $17,000.00, he would not have approved it, ".... in view of the conversations that I made with Regent Barnes." The net effect of Reeves' position was that, in his mind, Goetz would not recover the $17,000.00 - in any case - whether the actual contract did or did not include the $17,000.00. Neither he nor the Board conveyed this shocking conclusion to Goetz until after the work was completed and this lawsuit was filed.

In Wigmore on Evidence (2nd Edition - 1940), it is stated:

> § 2430 (1) "Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties thereto."
>
> § 2430 (2) "This intent must be sought where always intent must be sought..namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What was intended to cover, cannot be known till we know what there was to cover." (Emphasis-Wigmore).

"The purpose of the extrinsic evidence is to prevent fraud . . . . . However, the rule will not be applied where its enforcement would be inequitable or result in fraud, as where one party, under the application of the rule, would be enabled to obtain an unfair advantage over the other party." 23 Tex. Jur. 2nd Evidence § 342 (1961).

The facts in this case are undisputed and there is no occasion for the application of the parol evidence rule to reach an unjust result. A similar situation is discussed in 3 Corbin on Contracts, § 609 (1960):

> "Suppose, first, a case in which a bidding contractor makes an offer to supply specified work for a definitely named price, and that he was caused to name this price by an antecedent error of computation. If before acceptance, the offeree knows, or has reason to know, that a material error has been made, he is seldom mean enough to accept; and if he does accept, the courts have no difficulty in throwing him out. He is not permitted to 'snap up' such an offer and profit thereby. . . . . a just and reasonable man will not insist upon profiting by the other's mistake."

As noted by the Court of Civil Appeals: "Commendably the Board did not attempt to take advantage of the bona fide mistake. . . . . " and yet, the effect of the majority opinion is to order the Board to take advantage of the contractor without ever having passed on the legality of the

undisputed agreement of the parties to pay the additional sum. I agree with the holding of the Court of Civil Appeals that "there was no legal impediment to the just and honorable settlement of the matter by the Board" and the contractor.

I would affirm the judgment of the Court of Civil Appeals.

Sears McGee,
Associate Justice

Associate Justice Hamilton joins in this dissent.

Opinion delivered:
2/11/70

B-1599

IN THE COURT OF CIVIL APPEALS
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS
AT AUSTIN

NO. 11,669

WILLIAM E. GOETZ ET AL, APPELLANTS

VS

BOARD OF REGENTS OF THE STATE TEACHERS COLLEGES OF TEXAS, NOW BOARD OF REGENTS, STATE SENIOR COLLEGES, ET AL

APPELLEES

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT, NO. 133,767, HONORABLE TOM REAVLEY, JUDGE PRESIDING

This suit was brought by appellants Wm. E., Howard C. and Walter E. Goetz, partners, against the Board of Regents of the State Teachers Colleges of Texas, now Board of Regents, State Senior Colleges, the individual members of such

Board in their official capacities, acting for and in behalf of Southwest Teachers College in San Marcos, Texas, and the State of Texas, to recover on a contract allegedly executed by said Board and appellants for the construction of additions to the Library and Science Buildings at Southwest Teachers College in San Marcos. [1].

Trial to the court without a jury resulted in a judgment that appellants take nothing by their suit.

We reverse the judgment of the trial court and render judgment for appellants.

The principal facts were stipulated and we quote from the stipulation:

"1. Prior to August 12, 1958, Defendant(Appellee Board) with proper authority requested bids for construction and improvements on the Science Building and Library Building at Southwest Texas Teachers College of San Marcos, Texas.

2. The bids were to be submitted not later than 10 o'clock a. m. on August 12, 1958.

3. On August 12, 1958, a number of bids were submitted and opened. Plaintiff's (Appellant's) bid of Eight Hundred Sixty-four Thousand Eight Hundred Eighty-eight

1/Appellants obtained legislative permission to bring this suit. Acts 1963, Reg. Sess. 58th Leg. p. 1961.

and no/100 Dollars ($864,888.00) was the lowest, and the bid of M. A. Collins Construction Company of Eight Hundred Ninety - one Thousand Three Hundred Thirty -Three and no/100 Dollars ($891,333.00) was the second lowest bid.

4. By the provisions of Paragraph 10, page 15, of Defendant's Specifications, "Defendant was 'not obligated to accept the lowest bid or to accept any other bid.'

5. On August 12, 1958, a few hours after the bids had been opened, and before any bid had been accepted by Defendant, Plaintiffs notified Defendant that an error had been made in Plaintiff's bid and that Plaintiff's bid was TwentySix Thousand One Hundred Fifty-three and 65/100 Dollars ($26,153.65) too low.

6. On August 14, 1958, at the official meeting of Defendant Board, Defendant adopted the following motion.

"Upon motion of Regent Barnes, seconded by Regent Ramsey, it was ordered that

The low base bid of $858,888.00 plus Alternate No. 7 in the amount of $6,000.00 submitted by Wm. E. Goetz & Sons, of San Antonio, Texas for the additions and alterations to the Library and Science Buildings at Southwest Texas State Teachers College at San Marcos, Texas, be accepted and that the President of the Board be

authorized to sign the contract in the amount of $864,888.00 - contract reading as follows :

(contract omitted)

7. On August 14, 1958, at the official meeting of Defendant Board, the following motion was adopted:

'Upon motion of Regent Barnes, seconded by Regent Brown, it was ordered that:

The Board cooperate and work with the Attorney General's Department and see if there is a legal way to pay an additional $17,000.00 on the contract with Wm. E. Goetz & Sons. It is the concensus of this Board that the Board will make such payment if and when it is found it can legally pay the additional $17,000.00.

(Regent Barnes stated the motion just made accepting the low bid of Wm. E. Goetz & Sons, was made because of an honest mistake that was made by Wm. E. Goetz and Sons wherein the masonry work on the Science Building was not included and about which they knew nothing of when they submitted the bid. The cost of the masonry work would be approximately $26,000.00. The sub-contractors have advised that they will absorb $6,000.00 of the loss and Wm. E. Goetz & Sons have advised that they will absorb enough to bring the amount down to $17,000.00. I made the motion on

the theory that they were morally entitled to reimbursement for that amount, in the event it can be done legally.)

8. Pursuant to minutes referred to in stipulations 6 and 7 , and subsequent thereto, Plaintiff and Defendant signed a written agreement made and entered into the 14th day of August ; 1958, the same being the agreement attached to Plaintiff's Original Petition.

9. The Plaintiffs subsequently began and completed the work specified in the written agreement signed by the parties to the satisfaction of Defendants and Defendants paid to Plaintiffs the total compensation less $100.00 specified in the written agreement signed by the parties.

10. Defendants believing that they are under no legal obligation to pay the addition Seventeen Thousand and no/100 Dollars ($17,000.00) sum have failed and refused to pay the additional Seventeen Thousand and no/100 Dollars ($17,000.00) sum."

Mr. Walter E. Goetz testified that the resolution quoted above was adopted before he or the Board executed the contract.

Mr. Goetz also testified with reference to a conference between him and school officials in San Marcos the day before the Board meeting in Austin. We quote from this testimony:

"'Q. Now, Mr. Goetz, at this meeting that began

10:00 o'clock on August 13th in San Marcos, did you make any request concerning the withdrawal of your bid and the release of you from any obligation?

A Yes, I did. I made the request in the presence of Dr. Flowers, Mr. Adams, who is the manager, and Mr. Harvey Smith, and my brother, Howard Goetz.

Q All right, at this time, had the bids been accepted?

A No, it had not.

Q All right, and what was their response to your request to withdraw the bid?

A Well, Mr. Smith said that he didn't know whether I could withdraw the bid without forfeiture of the bond, but he said that he would take it up--let's see, that would be the next morning. We had a meeting at 10:00 o'clock with the Board of Regents, State Board of Regents in Austin, the next morning."

Mr. Goetz also testified:

"Q Okay, now, Mr. Goetz, so there won't be any question about it, I am going to ask you again did you request and desire to withdraw your bid on the original payment?

A At three different times, I did.

Q All right, was such request refused?

A Yes, it was, unless I forfeited the bid bond

Q All right, did you negotiate with the Board of Regents concerning the $26,000.00 mistake?

A I did.

Q And did the two parties arrive at a figure of $17,000.00, and agree upon it?

A That is right.

Q For the mistake?

A That is right.

Q All right, was this done prior to the execution of any written contract?

A Yes, it was. It was prior to the acceptance of the contract.

Q All right, would you have accepted any contract, or signed any contract, or entered into any contract without the agreement of the Board of Regents regarding the $17,000.00 payment ?

A I would not."

There is some discrepancy in the testimony regarding the advice which the Assistant Attorney General may or may not have given Mr. Goetz regarding his right to withdraw his bid if there was an innocent mistake in his bid. We do not regard this issue as controlling and will not

attempt to resolve it. The trial court found that both witnesses on this issue were truthful.

The trial dourt made findings of fact consisting with the facts stiuplated. We copy only Finding No. 10:

> "Subsequent to said motion to pay the $17,000 and in reliance upon the oral discussion to this effect as well as the action of the Board Plaintiff executed the written contract with Defendants in the amount of the erroneous bid."

The conclusions of Law of the trial court were that, "The contract between the parties was the written contract, drawn in accord with Plaintiff's bid. Defendants agreed to pay an additional $17,000.00 to the contract price, if they could legally do so. Under those circumstances Defendants could not do so, and have not. Nor may Plaintiff recover."

Our decision that appellants are entitled to recover is based upon well settled principals of law and equity.

There was no contract between the parties prior to the discovery of the mistake, its recognition by the Board and the compromise evidenced by the undisputed testimony and the adoption of the resolution by the Board. This resolution became a part of the formal contract under the rule that contemporaneous written instruments relating to the same subject are to be construed

together, and several distinct stipulations are to be construed so as to give effect to all. Rule 21, Art. 3713, V.A.C.S. The plain effect of the resolution was to add $17,000.00 to the contract price.

There is no dispute as to the authority of the Board to contract for improvements contemplated by the contract in suit. See Art. 2647, V.A.C.S.

Even if the bid had been accepted by the Board after knowledge of the mistake, appellants could have withdrawn their bid without penalty. State Highway Commission v. Canion, 250 S.W. 2nd 439, Tex. Civ. App. Austin, writ ref. n.r.e. (1952). See Taylor v. Arlington Ind. Sch. Dist. 335 S. W. 2nd 371. Sup. Ct. 1960, where relief was indicated even though the mistake was not discovered until after the bid was accepted. The equities of a situation such as we have here are graphically stated in Corbin on Contracts, Vol. 3, Sec. 609, p. 436, quoted in Canion and which we re-quote:

> "Suppose, first, a case in which a bidding contractor makes an offer to supply specified goods or to do specified work for a definitely named price, and that he was caused to name this price by an antecedent error of computation. If, before acceptance, the offeree knows, or has reason to know, that a material error has been made, he is seldom mean enough to accept; and if he does accept , the courts have no difficulty in

throwing him out. He is not permitted 'to snap up' such an offer and profit thereby .... a just and reasonable man will not insist upon profiting by the other's mistake."

Commendably, the Board did not attempt to take advantage of the bona fide mistake made by appellants. They corrected this mistake subject only to their legal right to do so. This caution is also commendable. We are satisfied that there was no legal impediment to the just and honorable settlement of this matter made by the Board and appellants.

We need not discuss the rights to appellants had the contract been formally executed by the parties before the discovery of the mistake.

Appellees contend that the contract between the parties was limited to its formal written agreement and to the exclusion of the resolution of the Board, and based upon this assumption they say that provisions of our Constitution, Secs. 44 and 51 of Art. 3, would be violated if the payment of the additional $17,000.00 is allowed. Since we have disagreed with appellees in their major contention it is unnecessary that we discuss the dependent issues.

The judgment of the trial court is reversed and judgment is here rendered that appellants recover of and from the Board of Regents, State Senior Colleges, and its members in their official capacities only, the sum of $17,000.00 with interest thereon from this date at the rate of 6 % per

SUPREME COURT, U. S

JUN 22 1970

CLERK

No. [redacted]234

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [redacted] 1970

WM. E. GOETZ, ET AL.

Appellants

v.

BOARD OF REGENTS OF THE STATE TEACHERS COLLEGES OF TEXAS, NOW BOARD OF REGENTS, STATE SENIOR COLLEGES, ET AL.

Appellees

MOTION TO DISMISS OR AFFIRM

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NOLA WHITE
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NO. 1666

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

WM. E. GOETZ, ET AL.

Appellants

v.

BOARD OF REGENTS OF THE STATE TEACHERS COLLEGES OF TEXAS, NOW BOARD OF REGENTS, STATE SENIOR COLLEGES, ET AL.

Appellees

MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellees, State of Texas, Board of Regents of the State Teachers Colleges of Texas, now Board of Regents, State Senior Colleges, and the individual members of such Board in their official capacities, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that this appeal be dismissed on the ground that the case does not present a substantial Federal question, and in the alternative, move that the case be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

annum.

Robert G. Hughes,
Associate Justice

Reversed and Rendered
Filed: April 23, 1969

STATEMENT OF THE CASE

This action is an appeal from a final judgment of the Supreme Court of Texas, the highest court of the State of Texas, in a declaratory judgment suit to adjudicate the contractual obligation of the State of Texas in a contract between Wm. E., Howard C. and Walter E. Goetz, partners, and the Board of Regents of the State Teachers Colleges of Texas, now Board of Regents, State Senior Colleges, an agency of the State of Texas.

The facts of this case are stated in the opinion of the Supreme Court of Texas, which opinion is set forth in Appellants' Appendix, pages 13-16, of their jurisdictional statement, and is reported at —— S.W.2d ——.

OPINIONS BELOW

The trial court in the instant case entered a declaratory judgment wherein the trial court declared that the legal obligation of the State of Texas in a construction contract dated August 14, 1958, is that stated in the written agreement and no legal obligation exists to pay Appellants an additional $17,000 above the contract price stated in the written agreement between Appellants and Appellees, and denied recovery by Appellants. The Court of Civil Appeals for the Third Supreme Judicial District of Texas reversed the judgment of the trial court on April 23, 1969. The Supreme Court of Texas on February 11, 1970, reversed the judgment of the Court of Civil Appeals for the Third Supreme Judicial District and affirmed the judgment of the trial court.

JURISDICTION QUESTIONED

It is questioned by Appellees that any substantial Federal question is presented for adjudication by the Supreme Court of the United States.

In the alternative, Appellees contend that the judgment of the Supreme Court of Texas should be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute and the constitutional provisions of the Constitution of Texas involved are produced in the Appendix to this motion.

ARGUMENT

This case is a declaratory judgment suit instituted by Wm. E., Howard C. and Walter E. Goetz, building contractors, brought against the Board of Regents of the State Teachers Colleges of Texas, now Board of Regents, State Senior Colleges, an agency of the State of Texas, seeking to have declared and adjudicated the obligations of the parties to a written contract dated August 14, 1958, to construct certain additions to the library and science buildings at Southwest Texas State University in San Marcos, Texas. Such declaration and adjudication has been made by the Supreme Court of Texas.

The Supreme Court of the United States will not review judgments of state courts that rest on adequate and independent state grounds. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487; *Cramp v. Board*

of Public Instruction, 368 U.S. 278; *Henry v. Mississippi*, 379 U.S. 443; *Black v. Cutter Laboratories*, 351 U.S. 292, 298; *Herb v. Pitcairn*, 324 U.S. 117, 125; *Klinger v. State of Missouri*, 13 Wall. (U.S.) 257, 263; *Murdock v. Memphis*, 20 Wall. (U.S.) 590, 636; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164; *Fox Corp. v. Mulloy*, 296 U.S. 207, 210; *Dixon v. Duffy*, 342 U.S. 33; *Young v. Rogen*, 337 U.S. 325.

The cases are also equally clear that the construction of state laws is the exclusive responsibility of state courts. *Speiser v. Randall*, 357 U.S. 513; *Lerner v. Casey*, 357 U.S. 468; *Albertson v. Millard*, 345 U.S. 242; *United States v. Burnison*, 339 U.S. 87; *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342; *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507.

Applying the foregoing principle to the instant case, it is respectfully submitted that there is no substantial Federal question presented. The case involves adjudication of contractual obligations of a contract between building contractors doing business in the State of Texas and an agency of the State of Texas. The contract was entered into and performed in the State of Texas and the obligations of such contract are governed by state law. Therefore the judgment of the Supreme Court of Texas rests on adequate and independent state grounds. The questions here submitted are so unsubstantial as not to warrant further argument.

In view of the foregoing, it is respectfully submitted that the judgment and the decree of the Supreme Court of Texas should be affirmed or in the alternative that this appeal be dismissed.

CONCLUSION

We respectfully submit therefore that Appellants have not presented a substantial Federal question and that this appeal should be dismissed, or the judgment of the Supreme Court of Texas should be affirmed.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED W. WALKER
Executive Assistant

J. C. DAVIS
Assistant Attorney General

JOHN REEVES
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Capitol Station
Austin, Texas 78711

Attorneys for Appellees

CERTIFICATE OF SERVICE

I, Alfred W. Walker, Executive Assistant Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing Motion has been forwarded by United States Mail, First Class, postage prepaid, to attorneys for Appellants, Mr. Earle Cobb, Jr. and Mr. James K. Gardner, 825 National Bank of Commerce Building, San Antonio, Texas 78205.

ALFRED W. WALKER
Executive Assistant Attorney General

APPENDIX

Constitution and Statutes Involved

Constitution of Texas, Article III, Section 44:

> "The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, *but shall not grant extra compensation to any* officer, agent, servant, or *public contractors, after such public service shall have been performed or contract entered into, for the performance of the same;* nor grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State, unless authorized by pre-existing law." (Emphasis added.)

Constitution of Texas, Article III, Section 51:

> "The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; . . ." (Exceptions not applicable.)

Texas Civil Statutes, Article 2647, Subdivision 7:

> "All appropriations made by the Legislature for the support and maintenance of State Teachers' Colleges, for the purchase of land or buildings for the use of such schools, *for the erection or repair of buildings,* for the purchase of apparatus, libraries or equipment of any kind or for any other improvement of any kind, *shall be disbursed under the direction and authority of the board of* regents: . . ." (Emphasis added.)

Supreme Court, U.S.
FILED
JUN 29 1970
E. ROBERT SEAVER, CLERK

No. [redacted]234

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [redacted]1970

WM. E. GOETZ, ET AL.

Appellants

v.

BOARD OF REGENTS OF THE STATE TEACHERS COLLEGES OF TEXAS, NOW BOARD OF REGENTS, STATE SENIOR COLLEGES, ET AL.

Appellees

REPLY TO MOTION TO DISMISS OR AFFIRM

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EARLE COBB, JR.

Attorneys for Appellants
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San Antonio, Texas, 78205

NO. 1666

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1969

* * * * *

WM. E. GOETZ, ET AL

Appellants

VS

BOARD OF REGENTS OF THE STATE TEACHERS COLLEGES OF TEXAS, NOW BOARD OF REGENTS, STATE SENIOR COLLEGES, ET AL.

Appellees

* * * * *

REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

* * * * *

TO THE HONORABLE UNITED STATES SUPREME COURT:

Now come Appellants, William E. Goetz, et al, and respectfully reply to the "Motion To Dismiss or Affirm" filed in this cause by Appellees, and would show the Court as follows:

I.

There is no question but that the Supreme Court of the United States will not

review Judgments that rest on adequate and independent State grounds. Appellant in the Jurisdictional Statement discussed the only question of adequate and independent State grounds - whether the application of the parol evidence rule to set aside a stipulated and undisputed contract suffices. It is significant, then, that Appellee's Motion does not cite any authority or offer any argument as to why they contend that the judgment of the Texas Supreme Court rests on adequate and independent State grounds. The lack of argument or reasons is a significant admission that adequate and independent State grounds do not exist in this case.

II.

An examination of the facts will show that the parol evidence rule was not remotely applicable, was incorrectly applied, and was arbitrarily applied to duck the real issue. As stated in the dissenting opinion of the Texas Supreme Court:

> "The majority opinion neglects to pass on the only question in this case."
>
> "....we should not duck the only question (legality of the compromise agreement) existing in the minds of the contracting parties by resort to rules of evidence in order to reach an unjust and contrary result."

If the constitutional provision that States shall not pass laws impairing contracts is to have any meaning, then the

States cannot be allowed to frustrate these contracts by subtrefuge and indirection.

III.

The contract between the parties in this case was undisputed as to any material fact, and Wigmore in his work on evidence (which is quoted by the majority opinion of the Texas Supreme Court), addresses himself to the very error which has been done here. 10 Wigmore on Evidence 3rd Edition, Section 2431 points out that many courts apply "incorrect tests", starting on Page 102 it is stated:

> "It is not uncommon to speak of the present rule as a rule against 'varying the terms of the writing.'"
>
> "No doubt, that is precisely the result of applying the rule. But it can never serve as a test to determine in the first instance whether the rule is applicable. The phrase as a test is to reason in a circle; for it is to attempt to decide whether something conceded to be different from the writing ought to be excluded, by showing that it is different. All the phrases about transactions that 'vary' or 'contradict' or are 'inconsistant' involve the same futility. The fundamental question is as to the intent of the parties to restrict the writing to specific elements or subjects of the negotiation;....."

The evidence is undisputed and stipulated in our case that such was not the intention, yet the Texas Supreme Court makes the very mistake alluded to by Wigmore when it says on Page 454 "These extrinsic negotiations are ineffective under the parol evidence rule which precludes the giving of legal effect to extrinsic negotiations which have been specifically dealt with in the final writing." As Wigmore so aptly states, this is reasoning in a circle.

The United States Supreme Court has repeatedly held that in order to make the constitutional inhibition effective the United States Supreme Court must exercise an independent judgment in deciding as to the validity and construction of the law and the existance and terms of the contract. Jefferson Branch Bank vs Skelly 1 Black 436, 443, 17 L. Ed. 173; Bridge Propriators vs Hoboke & Company 1 Wall. 116, 17 L. Ed. 571; Wright vs Nagle 101 U. S. 791, 25 L. Ed. 921 and McGahey vs Virginia 10 S. Ct. 972, 135 U. S. 662, 34 L. Ed. 304. To quote the Supreme Court still further, "As this Court has re peatedly ruled, the Constitution affords no protection as against an impairment by judicial decision....but, although the State Court may have construed the contract and placed it's decision distinctly upon it's own construction, if it appears, upon examination, that in real substance and effect force has been given to the statute complained of, our jurisdiction attached." Columbia Railway Gas & Electric Company

vs State of South Carolina 261 U. S. 236, 43 S. Ct. 306 67 L. Ed. 629, 36 Harvard Law Review, 882.

CONCLUSION

It is respectfully submitted that the U.S. Supreme Court has jurisdiction.

DATED this 23 day of June, 1970.

Respectfully submitted:

EARLE COBB, JR.
JAMES K. GARDNER

By James K. Gardner
James K. Gardner

WE, Earle Cobb, Jr., and James K. Gardner, Counsel of Record for Appellants, in the above entitled cause, hereby state that all parties required to be served with the foregoing Reply have been served.

ATTORNEYS FOR APPELLANTS

By James K. Gardner
James K. Gardner